U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

File: EAC 99 098 50538 Office: VERMONT SERVICE CENTER Date: JAN 8 2001

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center on July 27, 1999. At the time of denial, the petitioner was given a Form I-290B, Notice of Appeal, with instructions to submit the appeal by August 13, 1999. The director, however, made an error in the due date for the appeal, as an affected party has 30 days to appeal a denial by a Service officer. 8 C.F.R. 103.3(a)(2)(i).

The petitioner filed the appeal with the director on August 11, 1999, but neglected to submit the required filing fee of $110.00. Therefore, the Service Center rejected the appeal. The petitioner resubmitted the appeal on August 27, 1999 - 30 days after the original denial; however, the director determined that the petitioner filed a late appeal, and treated it as a motion to reopen pursuant to 8 C.F.R. 103.3(a)(2)(v)(B). The director affirmed his previous decision and denied the petition again on November 15, 1999. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that provides port equipment, tools, machines and construction materials to its customers. It claims to be a wholly-owned subsidiary of [redacted], located in Russia. The petitioner seeks to employ the beneficiary as President and, therefore, endeavors to classify him as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

On appeal, the petitioner submits a brief.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

In his denial, the director determined that the petitioner's organizational structure could not support a position that was primarily executive or managerial because the company employed a small number of individuals at the time it filed the petition. On appeal, the petitioner claims that since the filing of its initial I-140 petition, it has hired approximately five new employees, which brings the total staff from four individuals to nine individuals. The petitioner maintains that the company's organizational structure now supports an individual working in a primarily executive or managerial capacity.

The petitioner's argument is not persuasive. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). The Service may not consider the petitioner's hiring of five individuals in a determination of whether the beneficiary fits the definition of a multinational executive or manager because the individuals were hired subsequent to the filing of the petition. The record reflects that at the time the petition was filed, the beneficiary's duties were not primarily executive or managerial because the petitioner presented evidence that the day-to-day operations of the company were being accomplished by the beneficiary.

In the initial I-140 petition filing, the petitioner submitted an organizational chart of the U.S. company, with accompanying job descriptions for each employee. The following illustrates how the petitioner described the beneficiary's job duties:

> Runs the USA office, coordinates the work of Russian parent company and its American subsidiary, executes day-to-day operation of the company, hires and fires the staff; concludes agreements with manufactures [sic] and wholesalers, represents the company in all contacts without special authorization; controls the work of staff, defines financial and investment policy and activity, defines the marketing policy in the American market, defines the strategy of company development and broadening of services.

The petitioner claimed that the beneficiary executes the day-to-day operations, rather than directing or managing those operations. An individual who performs the services or provides the goods of an organization does not work in a primarily executive or managerial capacity.

Furthermore, the petitioner described the beneficiary's duties in general terms, such as, "controls the work of staff" and "runs the USA office." Without a detailed job description that includes the beneficiary's daily activities, the Service cannot find that the

beneficiary is a multinational executive or manager. Neither the beneficiary's title as president, nor the amount of investment he has made in the petitioner, compel the Service to conclude that the beneficiary's primary role is in an executive or managerial capacity.

As the petitioner has not established that the beneficiary was employed in a primarily executive or managerial position at the time it filed the I-140 petition, the decision of director is affirmed. Beyond the decision of the director, however, the petitioner has not presented evidence that a qualifying relationship exists between the U.S. and foreign entities.

The petitioner claimed in its initial I-140 petition that the foreign entity, [redacted] owns 100% of the U.S. company; however, the record does not contain any documentary evidence to show that a subsidiary relationship or an affiliate relationship exists between the U.S. and foreign entities.

Concerning the U.S. entity, the petitioner submitted a certificate of incorporation, which lists the beneficiary, [redacted] as the sole incorporator. The certificate of incorporation indicates that 200 shares of non par value stocks were issued; however, no stock certificates were submitted to show who or what entity owns the 200 shares of stock. Additionally, the petitioner did not submit any documentary evidence of the foreign entity's ownership. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Without documentary evidence of ownership for both the U.S. and foreign companies, the Service cannot conclude that a qualifying relationship exists.

The burden of proof in this proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.